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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KIRK BRIAN EGGLESTON, Defendant and Appellant.	B261524 (Los Angeles County Super. Ct. No. KA106649)

APPEAL from the judgment of the Superior Court of Los Angeles County, Juan C. Dominguez, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Kirk Brian Eggleston appeals from the judgment entered following his convictions by jury on count 1 – possession of child pornography, with an admission he suffered a prior conviction for violating Penal Code section 314, subdivision (1),[1] and count 2 – attempted possession of child pornography, with an admission he suffered a prior conviction for violating section 311.11, subdivision (a), and with an admission as to each offense he suffered a prior felony conviction. (§§ 311.11, subds. (a) & (b), 314, subd. (1), 664, 667, subd. (d).) We affirm.

FACTUAL SUMMARY

Appellant's attempted possession of pornography under count 2 (which is not challenged on appeal) was supported by evidence appellant used a residential computer to search for images of preteen models on January 6, 2014, and January 20, 2014.

For count 1, we view the evidence in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)). To prove count 1, the People presented the testimony of several librarians, i.e., Suzette Farmer, Jennifer Reyes, and Carlos Baffigo, who, on February 19, 2014, personally observed appellant viewing nude or partially dressed preteens on a computer in the Glendora Public Library. Baffigo, the library's support services manager, testified the police were summoned, including Glendora Police Officer Robbie Haney who testified he saw appellant seated at the computer when Haney arrived around 2:47 p.m. Haney testified that as he approached appellant, he saw images of young girls on the computer screen who were probably between 10 and 15 years old, partially clothed, and wearing bathing suits and undergarments. Haney observed appellant appeared to be nervous and was constantly looking around. After logging off, appellant admitted to Haney that appellant had been looking at photographs of young females, partially clothed and in bathing suits and undergarments.

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[1] Subsequent section references are to the Penal Code.

Another officer, Glendora Police Officer Ryan Lombardi, forensically examined the library computer. His examination revealed Internet searches, between 2:03 p.m. and 2:44 p.m. on February 19, 2014, for images of "tween modeling poses," "tweens in first bra," and "tween undergarments photo bucket." Lombardi discovered appellant made similar searches when he used the library computer on February 1, 2014 (using the search terms "tween girls swimwear Ukraine," "tween girls underwear," "tween girls swimwear Russia," "girl tween model," and "tween girls bathing suits"). Lombardi also located, on the computer's hard drive, about 200 photographs of apparently underage girls posing in swimwear and underwear, some in sexually suggestive poses.[2]

Glendora Police Detective Chris Farino, who arrived at the library around 3:00 p.m., testified Lombardi gave him the images found on the library computer, and Farino reviewed them and stored all of the images on a computer disk (People's exhibit No. 5). Farino created a seven-page document (People's exhibit No. 6) with 29 images comprising a representative sample of the 200 images. Farino described the images in the sample photographs as depicting girls between six and 13 years old, wearing lingerie and, in some cases, no bottoms, with the girls in sexually provocative poses making their buttocks or genitalia the center focus of the picture.[3]

Appellant presented no defense witnesses. We will present additional facts concerning People's exhibit No. 6 where pertinent below.

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[2] Lombardi retrieved evidence pertinent to count 2 from a computer seized in appellant's sister's residence which contained evidence of searches for preteen models on January 6, 2014, and January 20, 2014. Appellant's sister, Lori Albrechtsen, testified appellant had access to that computer and, sometime prior to February 19, 2014, she saw her brother viewing images on the computer of girls sticking out their tongues.

[3] People's exhibit Nos. 5 and 6 were admitted into evidence.

ISSUES

Appellant challenges the constitutionality of section 311.11, subdivision (a). He also contends insufficient evidence supports the verdict, and the trial court erred by failing to give a unanimity instruction, as to count 1.

DISCUSSION

1. *Sufficient Evidence Supports Appellant's Conviction on Count 1.*

Appellant's challenge to the sufficiency of the evidence rests on two claims: (1) section 311.11, subdivision (a) is void for vagueness and overbreadth and (2) insufficient evidence supports his conviction for possession of child pornography (count 1). We reject appellant's claims.

a. Applicable Law Addressing Vagueness and Overbreadth.

"In *New York v. Ferber* (1982) 458 U.S. 747, 756 [73 L.Ed.2d 1113, 1122, 102 S.Ct. 3348] [*Ferber*], the Supreme Court acknowledged that states are entitled to greater leeway in the regulation of child pornography than the court otherwise allows in obscenity cases. [Fn. omitted.]" (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1748 (*Kongs*).)[4] "In *Ferber*, . . . the United States Supreme Court determined that '[t]he test for child pornography is separate from the obscenity standard enunciated in *Miller*' (*id.* at p. 764) and production and distribution of child pornography is not entitled to First Amendment protection. [Citation.] Thus, under *Ferber*, 'pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in

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[4] The omitted footnote states, "The standard for obscenity was stated in *Miller v. California* (1973) 413 U.S. 15 [37 L.Ed.2d 419, 93 S.Ct. 2607] [*Miller*]. The *Miller* guidelines mandate that a state offense be 'limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.' (413 U.S. at p. 24 [37 L. Ed.2d at pp. 430-431].)" (*Kongs, supra*, 30 Cal.App.4th at p. 1748, fn. 1.) *Miller*, identifying "basic guidelines for the trier of fact" (*Miller, supra*, 413 U.S. at p. 24), identified one guideline as "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." (*Ibid.*)

Miller v. California, . . .' (*Free Speech Coalition* [2002] 535 U.S. [234], 240.)" (*People v. Gerber* (2011) 196 Cal.App.4th 368, 383.)[5]

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." (*United States v. Williams* (2008) 553 U.S. 285, 292 (*Williams*).) On the other hand, the "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. [Citations.] Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. [Citations.] But 'perfect

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[5] *Kongs* observes, "The Supreme Court [in *Ferber*] placed some limits on the category of child pornography . . . . It specified that the prohibited conduct must be adequately defined by the applicable state law and that the offense be limited to works that visually depict sexual conduct by children below a certain age. The types of sexual conduct must also be limited and described. [Citation.] Forbidding 'lewd exhibition of the genitals' is an example of a permissible regulation. [Citation.] The trier of fact need not find that the material appeals to the prurient interest of the average person, nor find that it portrays sexual conduct in a patently offensive manner. The material at issue need not be considered as a whole." (*Kongs, supra,* 30 Cal.App.4th at p. 1749.)

clarity and precise guidance have never been required even of regulations that restrict expressive activity.' [Citation.]" (*Williams, supra,* 553 U.S. at p. 304.)[6]

Section 311.11, states, in relevant part, "(a) Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any . . . photograph, . . . slide, photocopy, . . . computer hardware, computer software, . . . or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating *sexual conduct, as defined in subdivision (d) of Section 311.4,* is guilty of a felony . . . . [¶] . . . [¶] (d) It is not necessary to prove that the matter is obscene in order to establish a violation of this section." (Italics added.)

Section 311.4, subdivision (d), states, in relevant part, "(1) . . . 'sexual conduct' means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, *exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer*, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or

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6 *Williams* stated, "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. [Citations.] [¶] There is no such indeterminacy [in the statute at issue in *Williams*]. The statute requires [the defendant to harbor a certain belief and intent]. Those are clear questions of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.' " (*Williams, supra,* 553 U.S. at p. 306.)

opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct." (Italics added.)

b. Application of the Law.

(1) *Appellant's constitutional challenge is without merit.*

Appellant constitutionally challenges only the phrase "genitals or pubic or rectal area" in the phrase "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer" in section 311.4, subdivision (d)(1)'s definition of "sexual conduct," which in turn is incorporated into section 311.11, subdivision (a). After acknowledging *Ferber* upheld the constitutionality of a New York child pornography statute as against vagueness and overbreadth challenges, appellant first argues the phrase "genitals or *pubic or rectal area*" (italics added) in section 311.4, subdivision (d)(1) is vague compared to the term "genitals" in the definition of "sexual conduct" in the New York statute.[7] We reject the argument.

The word "exhibition" means "an exhibiting, showing, or presenting to view." (<http://www.dictionary.com/browse/exhibition?s=t> [as of Aug. 9, 2016].) " 'Rectal' is defined in Webster's Third New International Dictionary (1961) page 1899, as 'of, relating to, affecting, or located near the rectum.' In terms of section 311.4, the [word is] used in [its] ordinary sense." (*People v. Cantrell* (1992) 7 Cal.App.4th 523, 544.) The " 'rectal area' is the exterior area of the body near the rectum or anus" (*id.* at p. 545), "would necessarily encompass part of the seat of the body or what might be termed the lower part of the buttocks" (*ibid.*), and "encompass[es] the lower part of the buttocks" (*id.* at p. 547). Similarly, "pubic" means "of, relating to, or situated in or near the region of the pubes or the pubis" (Merriam-Webster's Collegiate Dict. (10th ed. 1995) p. 944) and "pubes" are "the hair that appears on the lower part of the hypogastric region at puberty" (*ibid.*).

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[7] The New York statute defined "sexual conduct" to mean, inter alia, " 'lewd exhibition of the genitals.' " (*Ferber, supra,* 458 U.S. at pp. 750-751.)

Accordingly, whether a minor is exhibiting (showing or presenting to view), or simulating exhibition of, genitals, the pubic area, and/or the rectal area presents a clear factual question requiring only common knowledge to resolve, and does not involve a subjective judgment such as whether conduct is "annoying." Moreover, section 311.4, subdivision (d)(1) refers to "exhibition of the genitals or pubic or rectal area *for the purpose of sexual stimulation of the viewer*," (italics added) and thus expressly requires proof of a defendant's state of mind, unlike the analogous provision in the New York statute.

Second, appellant argues the phrase "genitals or pubic or rectal area" in section 311.4, subdivision (d)(1) is "even more vague when one considers the fact that [*Kongs*] held that this includes a display of the genital area even if it is clothed, if that is the focal point of the picture." We reject the argument. In *Kongs*, an information alleged, inter alia, the defendant used a minor to pose for visual depictions of "sexual conduct" in violation of section 311.4, subdivision (c) as defined by section 311.4, subdivision (d). (*Kongs, supra*, 30 Cal.App.4th at pp. 1747, 1753, fn. 4.) The trial court granted the defendant's section 995 motion, concluding, inter alia, there was no "sexual conduct." (*Kongs*, at pp. 1747-1748.) On appeal the defendant argued that because a 10-year-old girl and other child models depicted in photographs possessed by the defendant "were covered by panties or a swimsuit at the time the photographs were taken, no sexual conduct can be found, regardless of [the defendant's] intent." (*Id.* at p. 1753.)

Kongs rejected the defendant's argument (*Kongs*, *supra*, 30 Cal.App.4th at pp. 1753-1756), later observing, "The *Ferber* case instructs us that states may legitimately protect the dignity and psychological well-being of children by forbidding child pornography. That purpose is served by construing Penal Code section 311.4 to encompass not only a nude exhibition of the pubic or rectal area, but, *in appropriate cases*, exhibitions focusing unnaturally upon a child's underwear- or bikini-clad pubic or rectal area. Notably, the Legislature did not require a 'nude' exhibition in Penal Code section 311.4, subdivision (d). Presumably, the Legislature was aware that for some

pedophiles, furtive glimpses of a child's underwear-covered genitals are sexually stimulating." (*Id.* at p. 1754, italics added.)

Kongs identified six factors "for a fact finder to consider when determining whether there has been a prohibited exhibition of a minor child's genitals, pubic, or rectal area." (*Kongs, supra*, 30 Cal.App.4th at p. 1754.)[8] *Kongs* noted, "With the exception of factor No. 6, which is a required element of a Penal Code section 311.4 violation, a trier of fact need not find that all of the first five factors are present to conclude that there was a prohibited exhibition of the genitals or pubic or rectal area: the determination must be made based on the overall content of the visual depiction and the context of the child's conduct, taking into account the child's age." (*Id.* at p. 1755.)[9] *Kongs* stated, "*In this instance*, a trier of fact could find that the focal point of Kongs's photography was on a child's pubic area; that the legs-apart poses were sexually suggestive and unnatural; that Kongs's instructions to have [the 10-year-old girl] place a finger on her chin and a hand at her waist suggested sexual coyness; and that the photographs were intended to elicit a sexual response in the viewer." (*Ibid.*, italics added.) *Kongs* reversed the trial court's order setting aside the information. (*Id.* at p. 1757.)

Notwithstanding appellant's suggestion to the contrary, *Kongs* did not hold that an exhibition of the "genitals or pubic or rectal area" within the meaning of section 311.4, subdivision (d)(1) included, as a matter of law, "a display of the genital area even if it is clothed, if that is the focal point of the picture." Instead, *Kongs* concluded the phrase

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[8] The factors are: "1) whether the focal point is on the child's genitalia or pubic area; 2) whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the child's conduct suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the conduct is intended or designed to elicit a sexual response in the viewer." (*Kongs, supra*, 30 Cal.App.4th at p. 1755.)

[9] The six factors in *Kongs* had their origin in *United States v. Dost* (S.D.Cal. 1986) 636 F.Supp. 828 (*Dost*). (*Kongs, supra*, 30 Cal.App.4th at p. 1754.) *Dost* observed, "the trier of fact should look" to the factors, "among any others that may be relevant in the particular case." (*Dost*, at p. 832.)

"genitals or pubic or rectal area" in subdivision (d)(1) did not, as a matter of law, require nudity and determined a prohibited exhibition of the "genitals or pubic or rectal area" could occur even if the genitals, pubic area, or rectal area was covered.

Whether an image depicting covered or uncovered genitals, a covered or uncovered pubic area, and/or a covered or uncovered rectal area is an "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer" is a true-or-false determination, rather than a subjective judgment such as whether conduct is "annoying." We therefore conclude that, on its face, section 311.4, subdivision (d)(1) is not unconstitutionally vague. We reject appellant's argument the above quoted phrase is facially overbroad as prohibiting a substantial amount of protected speech. Appellant cites no authority for the proposition that exhibition of a minor's genitals, pubic area, and/or rectal area for the purpose of sexual stimulation of the viewer includes protected speech.

We reject appellant's third argument that "child pornography . . . incorporates a test that is akin to the 'community standards' understanding of *obscenity.*" (Italics added.) The argument is based on a case (*U.S. v. Koegel* (E.D.Va. 2011) 777 F.Supp.2d 1014, 1024) construing an inapposite federal statute prohibiting possession of *obscene* visual representations of the sexual abuse of children. We decline to review or consider appellant's citation to Internet evidence (URL's and images) not included in the record below. (Cf. *In re Zeth S*. (2003) 31 Cal.4th 396, 405; *People v. Barnett* (1998) 17 Cal.4th 1044, 1183; *In re Carpenter* (1995) 9 Cal.4th 634, 646.)[10] For the same reason, we reject appellant's fourth and fifth arguments which ask this court to compare the images in this case with various URL's and Web sites not contained in the record below.

We conclude neither section 311.11, subdivision (a) nor its term "sexual conduct," defined in section 311.4, subdivision (d)(1), is void or overbroad, facially or as applied. *Kongs* "established that 'sexual conduct' under section 311.4 was not confined to nude

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[10] Appellant's reply brief contains four citations to alleged URL's and we similarly decline to consider the URL's or any images on any corresponding Web sites.

exhibitions," and gave appellant fair notice his actions were proscribed. (Cf. *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1132 (*Spurlock*).)

(2) *Sufficient evidence supports appellant's conviction on count 1.*

Appellant concedes he was looking at the various images reproduced in People's exhibit No. 6 while on a computer at the library. Appellant also concedes, "*The* issue in this case is whether *any* or all of those images [in People's exhibit No. 6] are 'child pornography' within the meaning of section 311.4(d)" (italics added) but argues "there is insufficient evidence that appellant possessed child pornography." We accept the concession and, for the reasons discussed below, reject the argument.

People's exhibit No. 6 consists of seven pages containing a total of 29 photographs that were stored in the computer, several of which are collages with multiple photographs of the same or different girls, all of whom are clothed or partially-clothed prepubescent minor girls in highly suggestive poses. Of the 29 photographs, 24 include the genital, pubic, and/or rectal areas of the girls' bodies. Two additional photographs depict girls in underwear hugging or kissing each other. Each of these two photographs shows, but does not particularly focus on, pubic areas.[11]

Farino described the photographs in People's exhibit No. 6 as depicting young girls wearing lingerie and, in some cases, no bottoms, in sexually provocative poses making their buttocks or genitalia the center focus. His description was accurate. The images include, for example, a girl lying down in a grassy area with legs spread, exposing her covered genital and pubic area; a smiling dark-haired girl lying on her left side, exposing her rectal area; another girl in blue shorts lying down with the focus on her covered genitalia, partially-covered pubic area, and exposed rectal area; and a smiling girl lying down with her legs raised in the air, again focusing on her covered genitalia, partially-covered pubic area, and exposed rectal area.

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[11] Three photographs are head shots of a girl suggestively sucking something, licking something, or sticking out her tongue, respectively. These are relevant only to appellant's instructional claim *post*.

The jury reasonably could have concluded any or all of the above described 26 photographs depicted "sexual conduct" as defined in section 311.4, subdivision (d)(1) because each exhibited a minor's genitals, pubic area, and/or rectal area in a sexually suggestive setting. As to each photograph, the setting was sexually suggestive because the setting is generally associated with sexual activity; the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; the child is partially clothed; the child's conduct suggests sexual coyness or a willingness to engage in sexual activity; and/or the photograph is intended or designed to elicit a sexual response in the viewer.

We have considered the *Kongs* factors even though *Spurlock* concluded section 311.4 does not mandate we do so for purposes of determining the sufficiency of the evidence. (*Spurlock, supra,* 114 Cal.App.4th at p. 1133.) Citing *Kongs*, *Spurlock* simply asked "whether a reasonable jury could determine, 'based on the overall content of the visual depiction and the context of the child's conduct, taking into account the child's age' [citation], that the photograph [at issue] depicts an exhibition of the genitals for the purpose of sexual stimulation of the viewer. (§ 311.4, subd. (d)(1).)" (*Spurlock,* at p. 1133.) Although not all of the 26 photographs particularly focus on genitals, the pubic area, or the rectal area, most of the girls are only partially clothed and many, including the girls hugging and kissing each other, are wearing age-inappropriate underwear that is plainly suggestive. As observed in *Kongs*, "a photograph of tots posing suggestively while dressed in corsets, garters, and hosiery could well be considered lewd because such attire is so inappropriate to their age and is obviously designed to elicit a sexual response in a viewer." (*Kongs, supra,* 30 Cal.App.4th at p. 1753.)

We conclude that, under either the *Spurlock* or *Kongs* standard, there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, appellant possessed child pornography in violation of section 311.11, subdivision (a) (count 1), including sufficient evidence of photographs depicting "sexual conduct" within the meaning of that subdivision and section 311.4, subdivision (d)(1). (Cf. *Ochoa, supra,* 6 Cal.4th at p. 1206; *Spurlock, supra,* 114 Cal.App.4th at pp. 1133-1134; see *Kongs, supra,* 30 Cal.App.4th at pp. 1756-1757.)

2. *The Court Did Not Err in Failing to Give a Unanimity Instruction.*

Appellant claims the trial court erred by failing to give a unanimity instruction as to count 1. Although count 1 of the information charged appellant with violating section 311.11 based on possession of a single image (alleging he "knowingly possessed or controlled *an image*" (italics added) in violation of section 311.11[12]) on or about February 19, 2014, the People presented evidence appellant retrieved multiple images and searched for images on the same library computer on two separate occasions (February 1, 2014, and February 19, 2014). People's exhibit No. 6, depicting 29 images retrieved from the library computer, was admitted into evidence.[13] Although the People did not formally designate any or all of the images in People's exhibit No. 6 as the sole basis of proof on count 1, the People's closing argument did not discuss any images other than the images in People's exhibit No. 6.

The prosecutor, in closing argument, advised the jury that "most, if not all, of [the images in People's exhibit No. 6, fall within the statutory definition of "sexual conduct"], but you only have to find one. In California, one image, 100 images, 500 images, one charge. So long as you agree that at least one of those photos shows a child engaging [in] or simulating sexual conduct, Mr. Eggleston is guilty." In closing argument, appellant's attorney argued the prosecutor's contention "one picture would be enough" mischaracterized the burden of proof because the People's burden was "to tie the picture to the viewing and the searching and the possession." Appellant's attorney argued, at

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[12] Although counts 1 and 2 of the information charge a violation of section 311.11, subdivision (b), the information also contains handwriting (from an unidentified source) striking the reference to subdivision (b). The reference to subdivision (b) appears to be a typographical error because that subdivision addresses the punishment for a violation of section 311.11, subdivision (a) and the jury was instructed that the People charged a violation of subdivision (a).

[13] Although the record indicates a computer disc containing all 200 images retrieved from the library computer was admitted as People's exhibit No. 5, there is no indication the jury had a computer or any other means of viewing the images on the disk and it is not part of the record on appeal.

length, that the prosecutor failed to prove possession or intent. With respect to the images themselves, appellant's attorney argued the images were not unlawful because there were no pictures of nude children and no pictures where genitals were exposed.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*).) *Jennings* also stated, "There are, however, several exceptions to this rule. . . . There . . . is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]" (*Ibid.*)

Although the information charged appellant with possession of a single image, the People presented evidence he searched for images on two occasions and possessed multiple images on February 19, 2014. The People did not expressly select any single image for the jury to evaluate, nor did the People specify the jury's task was to decide whether all of the images in People's exhibit No. 6 were unlawful. Under these circumstances, the court generally has a sua sponte obligation to give the unanimity instruction. (*People v. Castro* (1901) 133 Cal. 11, 13 [instruction required where information charged a single act of rape on a particular date but prosecution introduced a series of acts of sexual intercourse on various dates without selecting the particular act relied on]; *People v. Crawford* (1982) 131 Cal.App.3d 591, 596 [reversing for failure to instruct on unanimity because "certain jurors [convicting defendant of possession of a firearm] might have been convinced defendant possessed one [of four weapons recovered in his home], while others were convinced he possessed another weapon without all jurors at a minimum believing he possessed any one weapon"].)

However, as noted above, our Supreme Court has concluded the unanimity instruction is not necessary, or constitutes harmless error, if the defenses to all of the multiple acts are the same. (*Jennings, supra*, 50 Cal.4th at p. 679; see *People v. Diedrich*

(1982) 31 Cal.3d 263, 282-283 [failure to instruct can be harmless error where the defendant offers the same defense to all criminal acts and "the jury's verdict implies that it did not believe the only defense offered"]; *People v. Parsons* (1984) 156 Cal.App.3d 1165, 1174 [failure to instruct on unanimity is harmless error where defendant proffered no defense to receiving various items of stolen property and simply put the People to their proof]; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 792, fn. 6 [error can be harmless where "jurors cannot disagree concerning the defense offered"]; cf. *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071 [reversing for failure to give unanimity instruction on possession of narcotics charge where jury heard evidence of two acts (heroin discovered on appellant's television and in his coin pocket) and appellant's defense was the television heroin belonged to his son and the coin pocket heroin was planted].)

As was his right, appellant presented no defense witnesses in his case in chief. His defense, as articulated in his attorney's closing argument, was identical with respect to the content of all of the images in People's exhibit No. 6. Appellant's attorney addressed, at length, the People's failure to prove intent and possession of all of the images without mentioning any particular image or distinguishing among them. The attorney's only comment about the content of the images was noncontroversial. That is, counsel correctly stated in closing argument none of the images in People's exhibit No. 6 depicted minors who were nude or engaging in sex. These stated facts were not disputed at trial and are confirmed by the record. The trial court did not err by failing to give a unanimity instruction. (*Jennings, supra,* 50 Cal.4th at p. 679.)

In *People v. Vargas* (2001) 91 Cal.App.4th 506, 556-557, the court evaluated the prejudice of a unanimity instructional error by applying the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), i.e., whether it is reasonably probable a result more favorable to the appealing party would have been reached absent the error, noting that unanimity is a state constitutional requirement rather than a federal due process requirement. In *People v. Thompson* (1995) 36 Cal.App.4th 843, the court applied the standard in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) to

conclude "the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any." (*Thompson*, at p. 853.)

We conclude that, even if the trial court erred by failing to give a unanimity instruction, it is not reasonably possible any juror could have concluded any of the three headshots among the 29 photographs in People's exhibit No. 6 depicted genitals, the pubic area, or the rectal area; therefore, there was no need for a unanimity instruction as to those headshots. With regard to the remaining photographs, the question before the jury was a yes or no determination whether a particular photograph or all of the photographs included images depicting genitals, the pubic area, and/or the rectal area. As noted above, we have reviewed the remaining 26 photographs and have determined all of them include images of genitals, the pubic area, and/or the rectal area. Based on the record of the case as presented to the jury and the content of the 26 photographs, there is no reason to believe, and no basis in the record to suggest, the jurors did not determine all 26 photographs depicted "sexual conduct" as defined in section 311.4, subdivision (d)(1) or that the jury might have reached a different conclusion if the court had given a unanimity instruction. Therefore, applying either the *Watson* or *Chapman* standard, we conclude any instructional error was harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HOGUE, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.